CRIMINAL APPEAL.

P. V. Charry for the Appellant.

W. M. McCall (Crown Counsel) for the Respondent.

Laville, J. : — In this case appellant was charged with three others with possession of military goods, to wit, 2 wheels complete with tyres and 12 coils on 13.8.1947 at 3rd mile Jalan Kota Tinggi in a car, contrary to Section 5 (i) Proclamation 50.

The prosecution evidence was that police stopped a car, number not recorded, at 10.30 p.m. on that date at the junction of Kota Tinggi and Kebun Teh Roads: in it were the four accused and the two tyred wheels and a bag containing the coils: they gave no satisfactory account of how the goods came into their possession and were arrested.

An R.A.O.C. officer proved the wheels bore the W.D. mark and were similar to wheels and tyres in his charge at the Tebrau lorry park.

There was no attempt to prove which of the four had effective possession of these goods or that the possession was joint.

It is well established law that where possession imports criminality it must be proved that the possession is effective and exclusive, that is, that the person or persons charged have the control over and the disposition of the goods found with him or them and that no other persons have. In this case four men were found in conjunction with these articles and no attempt was made to prove that one, or some, or all of them had such control or power to dispose of the goods.

The learned District Judge, however, called on the defence and on the evidence of three of the accused decided that the present appellant was in possession of the goods. There was no other evidence save that of his co-accused against the appellant. The evidence of a co-accused against his fellow accused is to be given even less weight than that awarded to the evidence of an accomplice, and requires stronger corroboration. There was no corroboration by untainted evidence and, legally speaking, one accomplice cannot corroborate another.

The prosecution failed to make out a case and all accused should have been discharged at the close of the prosecution, nor can the evidence of the three co-accused support a conviction of the appellant. It was the duty of the prosecution, if the co-accused's statements to the police were similar to those they made in Court, to decide which of the arrested men could be proved to have possession and call the other members of the party in the car as witnesses.

For these reasons the appeal must be allowed and the conviction and sentence set aside, and I so order.

Appeal Allowed.

LUANG BHASA BHERAJ AND ANOTHER v. TAN KIM LEAN. *

[Penang — Civil Suit No. 49 of 1947 (Carey, J.) September 17, 1947]

Landlord and Tenant — Crucial date for the purposes of Increase of Rent (Restriction) Ordinance 1939 — Notice to quit.

The Plaintiff's claim was for possession of the premises let to the defendant on a monthly tenancy. At the date of service of the Notice to Quit rent was in arrears for more than 14 days.

A preliminary point arose as to whether the crucial date for the purposes of the Increase of Rent (Restriction) Ordinance 1939 was the date of service of the Notice to Quit or the date when the Writ was issued.

Held, that as soon as a tenant becomes fourteen days in arrear with his rent lawfully due the right accrues to the landlord to put in motion all steps to effect recovery of possession. The first step is to serve a Notice to Quit and on expiry thereof he may issue his Writ claiming possession. His course of action arose from failure on the part of his tenant to pay his rent after it became due.

Held also, following **Davies v. Bristow** (1920) 3 K.B. 428 that by the acceptance of rent the landlord is not to be taken as assenting to a renewal of the tenancy for he has no choice but to accept it and the tenant is regarded as holding over against the will of the landlord by virtue of the Ordinance.

Cases referred to :—

(1) *Wagner & anor. v. Tan Eng Yeow* (1947) M.L.J. 33.

(2) *Low Bee Hoe v. Morsalim and Goh Tien Lim v. Lee Ang Chin* (1947) M.L.J. p. 3.

(3) *Davies v. Bristow* (1920) 3 K.B. 428.

(4) *Hunt v. Bliss* (1919) W.N. 331.

(5) *Aston v. Smith* (1924) 2 K.B. 143.

CIVIL SUIT.

F. G. Pooley for the Plaintiffs.

Ong Huck Lim for Defendant.

Carey, J. : — The writ herein is specially endorsed with the following claim :—

> "The Plaintiffs' claim is for possession of premises known as Nos. 419, 425, 427, 429, 431, 431F and 431G Chulia Street, Penang, let by the Plaintiffs to the defendant on a monthly tenancy at the monthly rental of $240/- payable in advance.
>
> The tenancy was duly determined by a notice in writing dated 29th March, 1947 to quit expiring on the 30th April 1947 which was served on the defendant on the 29th day of March 1947 on which date the rent was more than 14 days in arrear.

* This case is reported for its intrinsic interest although the law is now contained in the Control of Rent Ordinance, 1948. Ed. M.L.J.

The Plaintiffs further claim double rent for the defendant holding over the said premises from the 30th day of April 1947 till the date when possession is given by the defendant to the Plaintiffs at the rate of $480/- per month."

A Statement of Defence was filed wherein the defendant pleaded *inter alia,* that (1) she had fully satisfied and discharged the plaintiffs claim for arrears of rent on the 8th April, 1947, before action, (2) she tendered the arrears of rent for May and June, 1947 before the writ was issued, and (3) she pleads the Increase of Rent (Restriction) Ordinance, 1939, and says that the plaintiffs have not obtained an order from the Rent Board for recovery of possession of the premises.

Counsel for the plaintiffs submitted that the preliminary point arose whether the crucial date for the purposes of the Increase of Rent (Restriction) Ordinance, 1939 was that on which the notice to quit was served or that upon which the writ was issued.

For the purpose of the argument on this point the defendant filed an admission of the facts that,

(1) Notice by the plaintiffs to the defendant to quit the premises the subject matter of this suit was served on the defendant on Saturday, the 29th day of March, 1947.

(2) On the 29th day of March, 1947, rent of the premises the subject matter of this suit was 28 days in arrear.

Plaintiffs' counsel referred to the cases of *E. A. S. Wagner & Another v. Tan Eng Yeow*[1] on the one hand and *Low Bee Hoe v. Morsalim* and *Goh Tien Lim v. Lee Ang Chin*[2] on the other. The latter two cases were separate appeals from the District Court, Singapore dealt with in the one judgment of Worley, J. The first mentioned case was an appeal from the decision of the District Juge, Kuala Lumpur, in which Willan, C. J. held that once rent has been in arrears for more than fourteen days the landlord is entited to issue a notice to quit without the permission of the Rent Assessment Board and that he does not waive his rights of ejectment by accepting rent from the tenant up to the date of the expiration of the notice to quit. The learned Chief Justice in his judgment went on to say :—

To hold otherwise would place landlords in an impossible position, because tenants would be able to default time and time again and only pay the rent in arrears when landlords issued notices to quit. This would mean that landlords would be forced to issue notice after notice, and each such notice could be rendered useless by subsequent payment of the rent in arrears. Since the provisions of the Rent and Charged Land (Restriction) Enactment, 1940, interfere with private rights, they must be construed strictly, and not in such a way that tenants would be able to default continually in payment of rent when due, and only pay such rent when ejectment proceedings had been commenced by the issue of a notice to quit.

In the Singapore case Worley, J. took the same view as to non-waiver of a notice to quit by acceptance of rent due for a period not going beyond the date of expiration of the notice. He further held that in any case, the rule or supposed rule of the common law that a landlord, who accepts rent accruing due after the expiry of a notice to quit, thereby waives that notice, can have no application in cases where the tenant remains in possession by virtue of the provisions of the Increase of Rent (Restriction) Ordinance, and that the material date for the purposes of Proviso (a) to Section 8 of the Increase of Rent (Restriction) Ordinance is the date of issuing the summons and if the landlord proves that at the time of the issue of the summons the rent was in arrear for fourteen days no subsequent tender before the date of hearing will avail the tenant, and further that the material date for the purposes of Proviso (a) to Section 8 of the Increase of Rent (Restriction) Ordinance is the date of the issue of the summons and if rent in arrears has been tendered by the tenant before the date of the summons, the proviso will not apply.

In the Settlement of Penang, as in Singapore, the law applicable is contained in the Increase of Rent (Restriction) Ordinance, 1939 as amended (hereinafter called "The Ordinance"), whereas in the Malayan Union, excluding the Settlements of Penang and Malacca, the Federated Malay States Rent and Charged Land (Restriction) Enactment, 1940 (hereinafter called "The Enactment") applies. Section 7 of the Enactment provides :—

No landlord shall without the permission of the Board in writing eject or apply to any Court for an order for the ejectment of or take any step towards ejecting his tenant from any premises to which this Enactment applies: Provided that this section shall not apply to ejectment for nonpayment of rent where rent at a lawful rate has been in arrear for fourteen days.

Section 8 of the Ordinance, as enacted, was in similar terms, but by section 5 of Ordinance No. 30 of 1941 that section was repealed and a new section 8 substituted, which, in so far as is relevant herein, provides :—

From and after the first day of August, 1939, no landlord or sub-landlord shall without an order of the Board eject or apply to any Court for an order for the recovery of possession of any premises to which this Ordinance applies:

Provided that this section shall not apply where —

(a) any rent lawfully due from the tenant is in arrear for fourteen days.

The preliminary point has been argued before me with a view to showing that the judgment of Willan, C. J. should be followed and not that of Worley, J. and *vice versa*.

It seems to me that the first consideration should be the difference in the law applying in the two territories. By the amendment of section 8 of the Ordinance the words "eject or apply to any Court for an order for the ejectment of or take any step towards ejecting his tenant or subtenant from any premises to which this Ordinance applies" which still are in force in the former Federated Malay States were, in so far as Singapore and the Settlements of Penang and Malacca are concerned, replaced by the words "eject or apply to any Court for an order for the recovery of possession of any premises etc." The proviso was also altered in wording and others added, but the effect is not material in so far as we are concerned herein. One must credit the legislature with intending the omission of the words "or take any step towards ejecting his tenant" and having some object in so doing. The Plaintiffs' counsel submits that, by serving notice to quit on a tenant, the landlord takes a step towards ejecting his tenant and that the word "eject" in the amended section of the Ordinance is sufficient to cover steps towards ejectment; that the word "eject" has reference to the relationship of landlord and tenant and the words "apply to any Court for an order for the recovery of possession" are intended to cover circumstances where such relationship does not exist, and he instances a tenant holding over and a statutory tenant to whom section 15 of the Ordinance makes reference. I cannot subscribe to either of these submissions. If the word "eject" is to be given such a wide meaning the mere serving of a notice to quit, when none of the conditions in the provisos to section 8 is present, would probably constitute an offence punishable under section 13 of the Ordinance. At least since the amendment of section 8 such an act does not, in my opinion, constitute an offence.

I shall have occasion, for convenience, to use the term "waiver of notice to quit" though, as was pointed out by Lush, J. in *Davies v. Bristow*[3] and other eminent judges in England, it is an inaccurate expression, in that, on the expiration of a notice to quit, the tenancy is determined and there is then no room for election by the landlord, though, of course, a new tenancy may be agreed upon on the old terms, and it is that is commonly meant by "waiver of notice to quit".

It appears to me that the seeming confusion in regard to the Malayan cases above referred to is attributable to a failure to appreciate that when the situation arises where the rent payable by a tenant is in arrear for fourteen days or, in Singapore and the Settlements of Penang and Malacca, one other of the provisos to section 8 of the Ordinance applies, the landlord, without an order of the Rent Assessment Board (hereinafter called "The Board") may serve notice to quit upon the tenant and, provided the notice is in order, on the expiration thereof, the tenancy is thereby determined. Should the tenant remain on in possession of the premises, the landlord, if he wishes to recover possession, must, in order to pursue his remedy and succeed thereon, satisfy the Court that rent was in arrear for fourteen days at the time of service of notice to quit, or in Singapore or the Settlements of Penang and Malacca that one other of the provisos to section 8 of the Ordinance applies. If no proviso applies and he cannot get an order of the Board, even though the tenancy is determined, say by effluxion of time, or even though in Singapore or the Settlements of Penang and Malacca he has determined the tenancy by notice to quit, he is obliged to allow the tenant to remain while the Ordinance continues in force and the tenant becomes a statutory tenant and is liable to pay the rent on the old terms. *Hunt v. Bliss*[4], *Davies v. Bristow*[3]. By the acceptance of rent the landlord is not to be taken as assenting to a renewal of the tenancy, for he has no choice but to accept it and the tenant is regarded as holding over against the will of the landlord by virtue of the Ordinance (*Davies v. Bristow supra*). Should the statutory tenant, as such, fail to observe all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of the Ordinance (or Enactment), including the obligation to pay rent, then the landlord can proceed to eject him and recover possession of the premises without further notice to quit, *Aston v. Smith*[5] unless, possibly, adopting the words of section 15 of the Ordinance, the tenant is entitled to the benefit of such a term or condition under the original contract of tenancy. I am aware that the relevant section of the English Act (The Increase of Rent and Mortgage Interest (Restrictions) Act, 1928) is not exactly the same as the local Ordinance, but similar reasoning seems to apply up to this stage of the proceedings. Assume the statutory tenant, as such, is fourteen days in arrear in paying his rent, the landlord can forthwith issue a writ claiming possession of the premises and, if he proves that such rent is lawfully due, he is entitled to succeed. In these circumstances no question of notice to quit arises. Here the material point is that the rent is in arrear for

fourteen days at the time of the issue of the writ. The contractual tenancy had been determined and it was against the statutory tenant that the cause of action arose.

In Singapore and the Settlements of Penang and Malacca it would seem that, though none of the provisos to section 8 may apply, the landlord can serve notice to quit, without permission of the Board, when he would, under the contract of tenancy, be entitled to do so, and then, on expiration of the notice to quit and consequent determination of the tenancy, if he holds over, the tenant becomes a statutory tenant, but thereafter, without the permission of the Board, the landlord is precluded from taking further steps to eject the tenant or recover possession of the premises, unless and until the tenant, as statutory tenant, fails to observe the terms and conditions of his original contract of tenancy, in so far as the same are not inconsistent with the provisions of the Ordinance.

In the States now forming part of the Malayan Union where the Enactment applies, for the purposes of determining the tenancy (without an order of the Board) the material fact is that rent has been in arrear for fourteen days at the time of service of the notice to quit and, for the purpose of enforcing the landlord's right to possession I can see no reason for reading into the Enactment a provision that the rent *is*, at the time of issuing the writ, in arrear for fourteen days. That it has been in arrear for fourteen days at the date of service of the notice to quit was sufficient to empower the landlord to determine the tenancy. Without that circumstance the landlord could not have issued a notice to quit, for, by so doing, he would be taking a step towards ejecting his tenant contrary to the provision of section 7 of the Enactment and possibly — I am not obliged to decide this now — would be punishable therefor under section 14.

As the author of the article on "Rent Restriction" in the Malayan Law Journal (Vol. XIII pp. XXI, XXII) says, there is a difference in the law in Singapore and the Settlements of Penang and Malacca on the one hand and the former Federated Malay States on the other. The main difference is caused by the amendment of sections 8 and 15 of the Ordinance. The application of section 8 was restricted by the addition of more provisos and by the deletion of the words "or take any step towards ejecting his tenant", to which I have referred above, and by section 15, after the determination of the tenancy the tenant becomes a statutory tenant on the conditions "(i) That he shall so long as he retains possession observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Ordinance, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the original contract of tenancy or, if no notice would have been so required, on giving not less than one month's notice, (ii) As against such statutory tenant the landlord or sub-landlord shall be entitled to all powers conferred upon a landlord under and by virtue of the Distress Ordinance". No such amendment of the Enactment was made, but I am inclined to believe that a tenant, where the Enactment is in force, also becomes a statutory tenant on the determination of his contract of tenancy, on the terms of his contractual tenancy, subject to such modifications thereof as may have been ordered by the Board, and would be liable in proceedings for ejectment and recovery of possession on failure to observe such terms. Once, however, he thereafter allows the rent lawfully due to fall into arrear for fourteen days, the landlord can proceed to eject him, without notice to quit, he having become a statutory tenant, and in this event (as in Singapore and the Settlements of Penang and Malacca) the material consideration would be the rent being in arrear for fourteen days at the time of the issue of the writ.

To recapitulate and partially summarise, after service of the notice to quit the landlord is not obliged to accept rent tendered as being due under the contructual tenancy and when the tenant holds over after the determination of the tenancy and pays rent, the landlord is not to be taken, by accepting it, to assent to a renewal of the tenancy on the old terms, for he has no choice but to recognize the statutory tenancy and accept the rent. So long as the landlord, before the expiration of the notice to quit, does not accept rent for a period extending past the date of expiration of the notice to quit or otherwise renew the original contract of tenancy, he does not waive such notice. The contractual tenancy is extinguished on the expiration of the notice to quit. If a statutory tenancy comes into being by the tenant holding over, it continues while the statutory tenant retains possession of the premises, taking advantage of the protection which the Ordinance or Enactment affords him. He can lose that protection by failing to observe the terms and conditions of his original tenancy which are consistent with the provisions of the Ordinance or, in the States forming part of the Malayan Union, with the original tenancy, subject to the modifications, if any, imposed by the Board, and then only the landlord may proceed to recover possession of the premises by applying to the Board for an order, or if any one of

the provisos to section 8 of the Ordinance or the proviso to section 7 of the Enactment respectively applies, by applying direct to the Court for recovery of possession without any notice to quit being given — subject as I have hereinbefore stated.

Whether in Singapore and the Settlements of Penang and Malacca, or in the States which form part of the Malayan Union, as soon as a tenant becomes fourteen days in arrear with his rent lawfully due, a right accrues to the landlord to put in motion the steps to effect recovery of possession. The first step is to issue a notice to quit and, on expiry thereof, he may issue his writ claiming possession. His cause of action arose on the failure of the tenant to pay the rent for fourteen days after it became due. Unless the landlord has done anything effecting a waiver of the notice to quit, his right of action survives unimpaired and it is the fact that the rent was so in arrear at the time of the service of the notice to quit that is the material consideration.

Where there is nothing to bring within the proviso to section 7 of the Enactment or the provisos to section 8 of the Ordinance, as the case may be, the landlord's right to recovery of possession of the premises from his contractual tenant, he must apply to the Board for an order, before ejecting his tenant, but, in Singapore and the Settlements of Penang and Malacca, he is not precluded in a proper case, from determining the contractual tenancy by serving notice to quit.

And now to apply my conclusions to the present case: — When notice to quit was served upon the tenant, the defendant herein, on the 29th March, 1947, the rent of the premises, the subject matter of this Suit, was 28 days in arrear. The notice to quit expired on the 30th April, 1947. Before such expiration the plaintiffs did not waive such notice. Rent due up to the 30th April, but not thereafter, was accepted by the plaintiffs during the period while the notice was running. The fact that rents due from and after the 30th April was tendered to the plaintiffs by the defendant is immaterial for the purposes of the plaintiffs' claim.

Judgment Accordingly.

CHENG AH SANG v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Laville, J.) February 28, 1948]
[Johore Bahru — Crim. App. No. 2 of 1948]

Common Gaming Houses, Laws of Johore Enactment 37, S. 4 (1) (a).

In this case the trying Magistrate called on the accused to plead to the charge of keeping or using a house, No. 12 at 5th Mile Jalan Kluang — Ayer Hitam, as a common gaming house on 28th December, 1947 contrary to the provisions of section 4 (i)(a) of the Common Gaming Houses Enactment. On his plea of guilty the Magistrate proceeded to take a summary of the facts alleged by the prosecution. He then questioned accused on those facts and, when he found accused did not admit the gaming was for money, he altered his plea of guilty to a claim for trial. The trial then proceeded and the accused was convicted.

Held, (a) that before the Court records a plea of guilty by the accused it should satisfy itself by questioning the accused that he does really understand the charge and admit each ingredient that goes to make it up. (b) That gaming is a highly technical and artificial offence and to insure a conviction it is necessary that the provisions of the Enactment be rigidly and meticulously followed out in order that the presumptions laid down for the help of the police in prosecuting offenders may arise.

CRIMINAL APPEAL.

A. J. Braga for Appellant.

Jaafar Taha — Deputy Public Prosecutor for Respondent.

Laville, J.: — The appellant in this case was convicted of keeping or using house No. 12, at 5th mile, Jalan Kluang — Ayer Hitam, as a common gaming house on 28.12.1947, contrary to the provisions of section 4 (i) (a) Enactment 37 of the Laws of Johore, and fined $500 or in default of payment 3 months R.I.

The trying Magistrate called on the accused to plead to the above charge which is recorded as having been explained to the accused, and on his plea of guilty proceeded to take a summary of the facts alleged by the prosecution, and then appears to have questioned accused on those facts and, when he found accused did not admit the gaming was for money, to have altered his plea of guilty to a claim for trial.

This procedure is open to criticism in that it elicits the prosecution evidence before the Court has satisfied itself as to whether the accused's plea of guilty is acceptable. A Magistrate should satisfy himself by questioning accused that he does really understand the charge and admits each ingredient that goes to make it up, before he records a plea of guilty by the accused and should record that the accused understands the charge before entering his plea of guilty.

The trial proceeded on the basis that accused had claimed trial, and it was therefore incumbent on the prosecution to prove its case affirmatively. It is quite clear that the information given to the police by the informer and recounted by the Court Inspector in his evidence is inadmissible as hearsay. It is also evident that the raid on No. 12 was not made under the provisions of the Gaming Enactment and that therefore no presumptions can be drawn in favour of the